

FENNEMORE CRAIG, P.C.
 Cathy L. Reece (AZ Bar No. 005932)
 Anthony W. Austin (NV Bar No. 010850)
 2394 E. Camelback Rd., Ste. 600
 Phoenix, AZ 85016-3429
 Telephone: (602) 916-5343
 Facsimile: (602) 916-5543
 Email: creece@fclaw.com
aaustin@fclaw.com

Attorneys for The Northern Trust Company

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re DESERT OASIS APARTMENTS, LLC, Debtor.	Chapter 11 Case No.: BK-S-18-12456-GS Hearing Date: March 11, 2021 Hearing Time: 1:30 p.m.
---	---

**THE NORTHERN TRUST COMPANY’S OBJECTION TO DISCLOSURE
 STATEMENT FOR CHAPTER 11 TRUSTEE KAVITA GUPTA’S JOINT PLAN
 OF LIQUIDATION AND CONFIRMATION OF THE JOINT PLAN OF
 LIQUIDATION**

The Northern Trust Company (“Northern Trust”), the secured lender of Desert Oasis Apartments LLC, hereby submits its objection to the Disclosure Statement for Chapter 11 Trustee Kavita Gupta’s Joint Plan of Liquidation [DE 243] (the “Disclosure Statement”) and objection to confirmation of the Joint Plan of Liquidation [DE 239] (the “Plan”). As detailed herein, the Disclosure Statement is deficient and the Plan violates the provisions of Section 1129 and is not confirmable in its present state.

While the Plan is effectively a liquidation plan that provides for the distribution of the sale proceeds it must still comply with the provisions of the Bankruptcy Code – notably Section 1129. Accordingly, the Plan may not discriminate unfairly and must still be fair and equitable as to each class and claim. See 11 U.S.C. § 1129(b).

I. Impairment Issues of NT claims

Curiously, the Trustee asserts in the Disclosure Statement and Plan that Northern Trust is not impaired and, therefore, deemed to have accept the Plan. However, the Trustee in the same breadth acknowledges that Northern Trust's claim is not treated pursuant to the terms of its agreement. Accordingly, Northern Trust's claims are impaired.

Impairment is defined, in relevant part, in Section 1124(1), which provides that "a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan ... leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." In the Ninth Circuit impairment is defined very broadly and includes "any alteration of the rights ... even if the value of the rights is enhanced." *In re L & J Anaheim Assocs.*, 995 F.2d 940, 942 (9th Cir.1993); *In re Val-Mid Associates, L.L.C.*, 2013 WL 139278, at *2 (Bankr. D. Ariz. 2013). In cases like this one, "claims are presumed to be impaired (and thus generally entitled to vote on the plan) unless one of the conditions in 11 U.S.C. § 1124 are met." *In re Seasons Apartments, Ltd. P'ship*, 215 B.R. 953, 958 (Bankr. W.D. La. 1997).

To escape the obvious alteration of Northern Trust's rights, the Trustee essentially asserts that Section 1124(1) is applicable and blames the Bankruptcy Code and the Court as opposed to the Plan for the impairment. But the Trustee's reliance on *In re PG&E Corporation* misses the mark. 610 B.R. 308, 315 (Bankr. N.D. Cal. 2019). In *PG&E*, the court agreed that the imposition of the Federal Rate of Interest by Section 726(a)(5) for unsecured creditors in a solvent case was not something dictated by the plan. *Id.* However, here, the Plan itself impairs Northern Trust's claims and, therefore, *PG&E* is inapplicable.

The Plan interjects itself into Northern Trust's rights in several ways. First, the Plan requires the approval of an opposing party before repayment of Northern Trust's fees and costs. See Article 4.1.3. No such requirement is found in the loan documents of Northern Trust or the Bankruptcy Code. Second, the Plan caps Northern Trust's fee and

1 cost recovery. See Article 4.1.2. No such limitation is placed on Northern Trust in the
2 loan documents. Third, the Plan effectively strips Northern Trust's liens off the sales
3 proceeds and limits it to the amount of the fee claim reserve. The Plan then provides to
4 make substantial payments to administrative claims and others diminishing the amounts
5 due to creditors. Accordingly, the Plan limits the recovery of Northern Trust on its claims
6 if a "Reversal Event" occurs through payment to the Disbursement Agent of \$132,000.00
7 and payment of fees and costs for Trustee and her counsel from the collateral of Northern
8 Trust. See Articles 3.1-4.

9 In addition to the limitations on recovery noted above, the Plan provides for nearly
10 all of the cash on hand to be paid to other creditors or claimants leaving little in the estate
11 to satisfy Northern Trust's claims. The Plan does provide for a reserve of \$75,000 to fund
12 on going attorneys' fees and costs incurred by Northern Trust in the Adversary. However,
13 the number is insufficient and appears arbitrary given the history of the Adversary and the
14 Trustee fails to provide any calculus for how it is calculated.

15 Northern Trust asserts that any such reserve should be at least \$500,000 given the
16 previous fees and costs incurred. Currently, Northern Trust's unpaid fees July 2020 and
17 August 2020 (which is before the closing of the sale of the property owned by
18 Apartments) total approximately \$100,000. Northern Trust has shared with the Trustee
19 redacted invoices of Fennemore Craig, P.C. for these months and has provided the amount
20 of fees incurred by Gerrard Cox Larson for the same period. Based on these invoices
21 alone, the \$75,000 will effectively be exhausted without any payment for fees and costs
22 after August 2020. Yet all parties acknowledge that the litigation has continued since
23 September 2020 and will continue for the foreseeable future and fees and costs will
24 continue to accrue. Based upon the history of the Adversary and likelihood of protracted
25 appeals and litigation a substantial reserve must be set to ensure payment of all fees and
26 costs incurred by Northern Trust.

27 Impairment is broad and despite the Trustee's attempts to avoid the issue, the Plan
28 impairs Northern Trust's rights. Accordingly, Northern Trust is entitled to vote on the

1 Plan and the Trustee's attempts to disenfranchise Northern Trust to prevent a potentially
2 negative vote renders the Plan unconfirmable.

3 **II. Inclusion of Reversal Event and no treatment of Northern Trust's**
4 **resulting claim is prejudicial and not fair and equitable.**

5 The Plan interjects itself into the middle of the issues between Northern Trust and
6 the Gonzales Trust. Such an interjection is not required and inappropriate. Further, the
7 process by which the Trustee intends to address these issues is flawed and inappropriate
8 and there is no treatment proposed for Northern Trust's resulting claim if there is a
9 Reversal Event.

10 a. Reversal Event is Improperly Defined

11 The Trustee goes on at length about how the potential finding that the Gonzales
12 Trust holds a priming interest over Northern Trust's recorded deeds of trust should be
13 handled. However, the triggering event deemed a "Reversal Event" is improperly
14 defined.

15 Article 1.40 of the Plan defines a "Reversal Event" as "a circumstance where both
16 of the following have occurred: (a) entry of a judgment by the Bankruptcy Court or other
17 court of competent jurisdiction reversing the Bankruptcy Court's April 22, 2020 judgment
18 in favor of Northern Trust in Adv. Proc. No. 19-01108 [Adv. Proc. Dkt. 39], and (b) entry
19 of judgment determining that the claim held by Brad Busbin, Trustee of the Gonzales
20 Trust has priority over the claim held by Northern Trust." Notably, the Trustee does not
21 require that any of these judgment be a "Final Order" which is defined as "an order of the
22 Bankruptcy Court as to which the appeal period has expired without an appeal having
23 been timely taken or, if an appeal is timely taken, such order has been affirmed on appeal
24 and any time for further appeal or petition has expired without any such further appeal or
25 petition having been filed." Article 1.26.

26 The Trustee already provides in many locations that certain rulings be a "Final
27 Order" before the Plan requires action. Curiously, it does not impose such a requirement
28 on the Gonzales Trust before requiring Northern Trust disgorge funds paid on its first

1 position interests. As currently drafted a Reversal Event could occur which is not a Final
2 Order, Northern Trust would then be compelled by the terms of the Plan to disgorge funds
3 even if Northern Trust intends to appeal the non-Final Order Reversal Event. See Article
4 4.1.4. Further, the Plan empowers the Gonzales Trust with “Assigned Refund Rights” and
5 directs the Disbursement Agent to distribute all remaining funds held by the Estate to the
6 Gonzales Trust regardless of whether the Reversal Event is a Final Order. See Article
7 4.2.6.

8 This process improperly favors the Trustee and the Gonzales Trust to the detriment
9 of Northern Trust. Such treatment is not fair and equitable and therefore the Plan cannot
10 be confirmed.

11 b. Why is the Trustee in middle of this?

12 Aside from the process the Trustee imposes on Northern Trust, the deeper question
13 is why does the Trustee even impose such a process regarding the Adversary issues.
14 There is no requirement that the Trustee, who is not a party to the Adversary, become
15 entangled in the adjudication of payments received by Northern Trust. Further, the funds
16 that may be disgorged are not property of the Estate and the Trustee has no interest in or
17 claim over those funds. The Trustee simply lacks any basis to dictate what Northern Trust
18 and the Gonzales Trust do in the Adversary.

19 If a Reversal Event, as the Trustee defines it, occurs, there is no reason or
20 justification for the Trustee to become involved. At such a time, the Gonzales Trust can
21 exercise its rights and seek disgorgement from Northern Trust of the appropriate amount
22 of funds to satisfy whatever claim is deemed a priority right. The Trustee is not
23 implicated and there is no basis for the Trustee to insert herself into that process.
24 Accordingly, there is no basis for the Plan to impose any process on Northern Trust. All
25 the Trustee need provide for in the Plan is mechanism to provide for payment to Class 5 if
26 its an allowed unsubordinated claim and a Reversal Event occurs. Anything beyond that
27 is simply overreaching by the Trustee.

1 c. The Plan ignores Gonzales Trust's other collateral

2 The Trustee in formulating the Plan ignores the fact that Gonzales Trust holds a
3 secured interest in other real property from which it may obtain a substantial recovery.
4 This additional property exceeds the amount of Gonzales Trust's total claim by an order
5 of magnitude. This source of recovery was negotiated for and obtained as part of the
6 credit bid by Shotgun to acquire the property.

7 By ignoring this interest, the Trustee improperly shifts the burden to pay Gonzales
8 Trust's claim to Northern Trust. Instead of balancing the recoveries for the Gonzales
9 Trust, the Trustee through the Plan places Northern Trust as the sole party responsible for
10 paying the Gonzales Trust claim if a Reversal Event occurs. By forcing such a burden on
11 Northern Trust the Plan cannot be deemed fair and equitable and cannot be confirmed.

12 As this Court is aware, one of the concepts central to appellate law is whether the
13 trial court can fashion an "equitable remedy" should the an order or judgment be reversed.
14 See *Motor Vehicle Cas. Co. v. Thorpe Insulation Ins. Co. (In re Thorpe Insulation Co.)*,
15 Inc., 677 F.3d 869, 883 (9th Cir. 2012) ("most importantly, we look to whether the
16 bankruptcy court on remand may be able to devise an equitable remedy."). In examining
17 whether an equitable remedy is available, the courts examine whether it is "practical and
18 equitable" to "unscramble the eggs" after a reversal. *Baker & Drake, Inc. v. Pub. Serv.*
19 *Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1352 (9th Cir.1994).

20 Unscrambling the eggs in the Adversary impacts not only Northern Trust but the
21 Shotgun entities and places Gonzales in a priority position over both entities.
22 Accordingly, a practical and equitable result requires that any equitable relief fashioned
23 bear the burden of that priority claim uniformly and equitably. Here, the Plan places the
24 entirety of the Gonzales Trust squarely on Northern Trust. As a fiduciary for the estate
25 and its creditors one would expect the Trustee to seek to ensure creditors of her estate are
26 treated fairly and equally but insisting that the Shotgun entities bear their share of the
27 damage done by a Reversal Event. The Trustee's inexplicable failure to consider
28

1 Shotgun's share of payments favors the Gonzales Trust at the expense of Northern Trust
2 and therefore the plan is not fair and equitable.

3 d. The Plan improperly imposes disgorgement on only Northern Trust

4 The Trustee does not dispute that the sale proceeds constitute the collateral of
5 Northern Trust. This reality is true whether the Gonzales Trust is deemed to hold a
6 priority right to payment or Northern Trust's claims are confirmed as being in first
7 position. In other words, after payment to the Gonzales Trust the entirety of the
8 remaining funds would be subject to Northern Trust's security interests. In spite of
9 Northern Trust's security interest in the sale proceeds, the Trustee has paid and intends to
10 pay various administrative and other creditors thereby depleting the amount of funds
11 available if a Reversal Event occurs.

12 If a Reversal Even occurs, the Plan requires Northern Trust to disgorge to the
13 Gonzales Trust the entirety of funds it received from the estate to satisfy the Gonzales
14 Trust's claim. Notably, the Plan does not address whether the Gonzales Trust is entitled
15 to a priority payment the full \$13 million amount claimed or only the \$10 million transfer
16 fee and simply presumes the entirety is paid. The Plan then pays over all remaining funds
17 the Estate holds to the Gonzales Trust after payment **in full** of the Disbursing Agent's
18 fees, any fees of professionals hired by the Disbursing Agent, and Administration Claims
19 and leaves Northern Trust with little to no recovery. See Article 4.2.6

20 Notably, administrative creditors and the Disbursing Agent are not required to
21 disgorge or return any funds to the Estate. Accordingly, these administrative creditors
22 retain Northern Trust's collateral while Northern Trust takes little or nothing on its
23 undisputed secured claim. Such a result is inequitable and represents an unpermitted
24 surcharge of Northern Trust's collateral. The payment of all other creditors in full except
25 Northern Trust is yet another example of the disparate treatment the Plan forces on
26 Northern Trust.

27 e. What claims are assigned to the Gonzales Trust?

28

Further entangling itself into the Northern Trust and Gonzales Trust relationship the Trustee assigns her “Assigned Refund Rights” to the Gonzales Trust. These rights apparently include “any rights DOA and/or the DOA Estate may have under applicable law to recover funds paid to Northern Trust...in the event a Reversal Event occurs, if such rights exist.” See Article 1.8. Why such a provision is necessary is unclear as the Trustee is apparently unsure such rights even exist as the very next sentence states “This provision does not [sic] create a right of refund or recovery that does not or would not otherwise exist under applicable law or establish the extent of the right to any refund.” *Id.* The Plan assigns these “rights” to the Gonzales Trust on the Effective Date and authorizes Gonzales to pursue these claims after a Reversal Event.

From a threshold perspective, it is unclear what if anything is actually assigned as the Trustee has no basis to request a refund. The Order requiring the Trustee disburse the sale proceeds to Northern Trust is final and is not on appeal. Accordingly, the Trustee is estopped (judicially and collaterally) from claiming any right to the disbursed funds. Further, any order from this Court or other court with respect to disgorgement of the sale proceeds by Northern Trust would be entered with respect to the Adversary and would direct payment to the Gonzales Trust – not the Trustee. Accordingly, these “rights” are fictional and their inclusion only creates confusion and interjects the Trustee where she has no right to be involved.

III. Deferral to Gonzales Trust Inappropriate

Inexplicably, the Plan creates a Disbursing Agent but also defers in large part to the wishes of Gonzales Trust. In fact, the Gonzales Trust controls many of the Plan’s provisions and holds an effective veto. A few of the instances of the Trustee’s deferral to the Gonzales Trust are discussed below.

a. Review of Invoices

Article 4.1.3 provides the Trustee’s vision of how to review and approve Northern Trust’s continuing legal expenses for which it is entitled to payment. Notably, and inappropriately, the Plan requires Northern Trust to disclose unredacted invoices to its

1 opposing party – the Gonzales Trust. There is no basis to require Northern Trust disclose
2 confidential and privileged information to the party in which it is engaged in litigation.

3 The Plan goes further and requires the Gonzales Trust approve repayment to
4 Northern Trust before a payment will be made. If Gonzales Trust does not approve a
5 payment then Northern Trust is forced to incur time and expense of seeking this Court’s
6 approval.

7 While Northern Trust does not dispute that an oversecured lender is limited to
8 “reasonable” fees pursuant to Section 506(b) the Trustee’s proposal is not appropriate. To
9 review reasonableness it is axiomatic that some review must be done and Northern Trust
10 does not oppose a reasonable process the preserves confidentiality and limits exposure of
11 potentially privileged information. However, Section 506(b) does not mandate that an
12 oversecured creditor share unredacted invoices related to litigation with the opposing
13 party to that very same litigation.

14 b. Litigation Issues

15 The Plan in Article 6.8 retains all “Litigation Claims” and Article 6.11 authorizes
16 the Disbursing Agent or Trustee to pursue those claims which constitute “all legal claims
17 for relief of every nature held by the Estates against another person or entity, and all other
18 legal rights or causes of action of DOA and/or DOI.” See Article 1.35. However, the
19 Disbursing Agent is required to consult with the Gonzales Trust before taking action on
20 the Litigation Claims, compromising Disputed Claims, and payment of compensation.
21 See Article 6.12. For some actions, the Gonzales Trust even holds an effective veto. See
22 Article 6.12.4.

23 c. Settlement of Claims

24 Interestingly, the Disclosure Statement states that the “Plan settles the avoidance
25 claim against the Gonzales Trust.” DE 243 pg 35, line 6. However, the Plan and
26 Disclosure Statement are silent on what was actually settled and what each party receives
27 as part of that settlement. Did the Gonzales Trust receive preferential treatment to resolve
28

1 the avoidance action issues? The Disclosure Statement fails to provide adequate
2 information on these issues.

3 As noted above, the Gonzales Trust is assigned various rights from the Trustee, is
4 entitled to consultation rights, and veto rights. Similar rights are not granted to Northern
5 Trust despite it remaining a secured creditor of the Estate. One such reason for denying
6 Northern Trust equal treatment might be the Trustee has conceded to such rights in
7 exchange for the Gonzales Trust acquiescing to the Plan provisions and perhaps even
8 voting in favor of the Plan.

9 **IV. Conclusion**

10 For the reasons set forth herein, the Plan cannot be confirmed as it improperly
11 shoulders Northern Trust with the burden of paying the creditors and administrative
12 expenses. Accordingly, Northern Trust requests the Court deny confirmation of the Plan.

13
14 Dated: February 25 2021

FENNEMORE CRAIG, P.C.

15 By: /s/ Anthony W Austin

16 Cathy L. Reece (AZ Bar No. 005932)

17 Anthony W. Austin (010850)

Counsel for The Northern Trust Company

18 COPY of the foregoing served by
19 E-mail/ECF Notice this 25th day of
20 February, 2021 upon:

21 Lenard E. Schwartzer
22 Schwartzer & McPherson Law Firm
23 bkfilings@s-mlaw.com
Attorneys for Debtor

24 Edmund M. McDonald
25 Edmund Gee
26 U.S Trustee's Office-LV-11,11
27 Edward.m.mcdonald@usdoj.gov
28 Edmund.gee@usdoj.gov

Jamie P. Dreher

1 Downey Brand LLP
2 jdreher@downeybrand.com
3 reno@downeybrand.com
4 *Attorneys for the Gonzales Trust*

5 Mark Wray
6 Law Office of Mark Wray
7 mwrap@markwraylaw.com
8 tmoore@markwraylaw.com
9 Fischerlawcal@aol.com
10 *Attorneys for the Gonzales Trust*

11 Kevin W. Coleman
12 Kimberly S. Fineman
13 Christopher Hart
14 Nuti Hart, LLP
15 kcoleman@nutihart.com
16 kfineman@nutihart.com
17 chart@nutihart.com
18 *Attorneys for Kavita Gupta, Trustee*

19 Talitha B. Gray Kozlowski
20 GTG, LLP
21 tgray@gtg.legal
22 *Attorneys for Kavita Gupta, Trustee*

23 Jerrold L. Bregman
24 jbregman@bg.law
25 ecf@bg.law
26 *Attorneys for Trustee Jeffrey I. Golden*

27 /s/ Gidget Kelsey
28